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CITATIONS

520469—43——1

Miscellaneous—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 806

CORT A. ROSENHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court of the United States for the District of Utah (R. 15) was entered without an opinion. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 17–22) is reported in 131 F. (2d) 932.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 16, 1942 (R. 22). On February 8, 1943, the time within which to file a petition for writ of certiorari was extended to

March 15, 1943, by Mr. Justice Murphy (R. 24). The petition for writ of certiorari was filed March 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

QUESTIONS PRESENTED

1. Whether Section 302 of the Civil Aeronautics Act of 1938, providing for the establishment of civil airways across states, and Section 610, forbidding the operation of aircraft within a civil airway without a certificate of airworthiness, are constitutional as applied to a flight entirely within a state.

2. Whether the certificate of airworthiness referred to in Section 610 (a) (1) of the Act includes one issued by a state regulatory body.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the statutes and regulations involved are set forth in the Appendix, pp. 10–18, *infra*.

STATEMENT

The United States, by civil complaint containing four causes of action, brought suit against petitioner in the United States District Court for the District of Utah, to recover civil penalties for violation of Section 610 (a) (1) of the Civil Aeronautics Act of 1938 (R. 4–7). After an amended answer was filed to the complaint (R. 8–11, 12–13), the United States moved for

(R. 12) and was granted judgment upon the pleadings (R. 14). The facts as shown by the pleadings are as follows:

Pursuant to Section 302 of the Civil Aeronautics Act, the Administrator of the Civil Aeronautics Authority designated and established a civil airway from San Francisco to New York, which included an airspace twenty miles wide through the State of Utah (R. 4–5, 8).[1] Thereafter, on four separate dates in 1940, petitioner operated in air commerce, within that civil airway in the State of Utah, a civil aircraft for which there was not currently in effect an airworthiness certificate issued by the Civil Aeronautics Authority (R. 5–7).

Admitting these facts, petitioner defended upon the grounds that at all times mentioned the aircraft was operated within the limits of the State of Utah (R. 10); that he had an airworthiness certificate for the aircraft from the Utah State Aeronautics Commission (R. 8–11); and that the Civil Aeronautics Act insofar as it purported to apply to the operation of aircraft entirely within the border of the state violated the Tenth Amendment to the Constitution (R. 10, 12–13).

The District Court entered judgment for the United States on the pleadings and assessed a

[1] Section 60.2001 of the Air Traffic Rules as amended to May 31, 1938. Subsequent amendments (14 C. F. R., 1940 Supp. § 600.2 (a) (2), p. 1327) are not here involved.

civil penalty of $1 against petitioner on each of the four counts (R. 14–15). The court below affirmed (R. 22), holding that the Civil Aeronautics Act was constitutional insofar as it marked out civil airways across the State of Utah and undertook to regulate flying therein, and that the airworthiness certificate issued by the Utah State Aeronautics Commission did not meet the requirements of Section 610 (a) (1) of the Act.

ARGUMENT

The Civil Aeronautics Act makes it unlawful "for any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate" (Sec. 610 (a) (1)). Air commerce is defined to include "any operation or navigation of aircraft within the limits of any civil airway" (Sec. 1 (3)), which is in turn defined as a path through the navigable air space designated or approvel by the Civil Aeronautics Administrator "as suitable for interstate, overseas, or foreign air commerce" (Sec. 1 (16)). Petitioner admittedly operated an aircraft within the civil airway which crossed the State of Utah without a certificate of airworthiness issued by the Civil Aeronautics Authority. He contends here, however, as he did below, that he is not liable for the civil penalties provided in Section 901 (49 U. S. C. 621) because the Act, if applied to his flight solely within Utah, is an unauthorized assumption of Federal jurisdiction in a field reserved exclusively to the states under the Tenth Amendment.

He further contends that even if the Act be constitutional, the certificate of airworthiness issued to him by the Utah State Aeronautics Commission constituted sufficient compliance with Section 610 (a) (1).[2] We submit that the court below correctly decided these questions adversely to petitioner's contention.

1. The power of the Federal Government over interstate means of transportation is plenary (*United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426) and clearly extends to facilities such as airways which are used or are susceptible of being used as highways of commerce. *The Daniel Ball*, 10 Wall. 557; *cf. Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279. The prohibition against flight of aircraft within the interstate highway unless the constituted federal authority has certified such aircraft as "airworthy" is a safety measure in the interests of the interstate traffic over that highway (*cf.* Secs. 601, 603 (c) of the Act), and in view of the undeniably close relationship of any flight within an interstate air highway to the commerce sought to be protected by the federal law (*cf. Wickard* v. *Filburn*, 317 U. S. 111; *United States* v. *Wright-*

[2] Petitioner alleges in his petition that he had constructed his airplane himself (p. 1), that he had made application to the Civil Aeronautics Authority for a certificate of airworthiness, and that the Board had refused to examine his plane (pp. 2, 17–18). These facts were not alleged in his answer and are nowhere reflected in the record.

wood Dairy Co., 315 U. S. 110, 119) safety measures may appropriately be applied to movements over the highway which are entirely within a state. *Southern Ry. Co.* v. *United States,* 222 U. S. 20, 27; *Texas and Pacific Ry.* v. *Rigsby,* 241 U. S. 33, 41; *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 607; *cf. Kirschbaum Co.* v. *Walling,* 316 U. S. 517.

Petitioner's contention that the interstate traffic over the airway was too trifling to support regulation of intrastate flights is without merit, for if the power exists its exercise is solely for the legislative judgment. *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 408. The reasonable relation of the regulation to the federal objective is obvious from the truism that unrestricted flights by unapproved aircraft through an interstate airway lane may endanger and seriously interfere with aircraft moving in interstate commerce. As the court below observed (R. 21), it is not material whether petitioner's flights in question actually endangered interstate commerce in the civil airway.

2. The certificate of airworthiness required by Section 610 (a) (1) of the Act is clearly one to be issued by the Civil Aeronautics Authority. The declaration of policy (Section 2 of the Act) emphasizes the desire to "assure the highest degree of safety" in air transportation through appropriate regulation by the Authority, and Sec-

tion 601 vests the Authority with general regulatory power "to promote safety of flight in air commerce". Section 603 empowers the Authority to issue an "airworthiness certificate" containing terms and conditions "required in the interest of safety" for any plane which the Authority finds, after inspection, conforms to the type certificate therefor and "is in condition for safe operation". Section 610 prohibits the operation of aircraft in air commerce without an airworthiness certificate, "or in violation of the terms" thereof.[3] It is impossible not to conclude from these provisions that the certificate required by Section 610 is one issued by the Authority. Any other conclusion invites danger to interstate air transportation from conflicting standards as to airworthiness of craft flying in the same lanes, and renders Section 610 virtually ineffective.[4] As the court below observed (R. 20), "the Act does not textually recognize a state certificate of airworthiness as a compliance with its requirements, and we cannot presume a congressional intent to do so."[5]

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[3] Sections 601, 603, and 610 are part of a subchapter entitled "Civil Aeronautics Safety Regulations."

[4] This danger was adverted to at the hearings on the bill. See Hearings on H. R. 9738 before the House Interstate and Foreign Commerce Committee, 75th Cong., 3d Sess., pp. 343–344.

[5] Civil Aeronautics Bulletin No. 4 (Oct. 1, 1939), as brought up to Jan. 1, 1943, by the Civil Aeronautics Authority, shows

The historical setting of the Act likewise compels the conclusion reached below. Under Section 3 of the Air Commerce Act of 1926, c. 344, 44 Stat. 568, 569, the Secretary of Commerce was authorized to provide by regulation for the rating of aircraft of the United States for airworthiness. The regulations which he issued pursuant thereto (quoted in part *infra*, pp. 16–18) defined "an airworthiness certificate" as a "document issued by the Secretary to the registered owner of an aircraft, certifying that the aircraft in question is airworthy when operated and maintained in accordance with the terms of said certificate" (14 C. F. R. 01.13). After enactment of the Civil Aeronautics Act on June 23, 1938, vesting such powers in the Authority, these regulations were amended on August 30, 1938, by substituting "Authority" for "Secretary" and "Civil Aeronautics Act of 1938" for "Air Commerce Act" (14 C. F. R., p. 633 (1938 Supp.)). The certificate of airworthiness to which Section 610 of the Act re-

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that thirty-nine states require a Federal airworthiness certificate. Eight states, of which Utah is one, require a Federal or State airworthiness certificate. The Utah statutes call for substantial similarity to the Federal regulations governing safety and recognize the danger of accident through conflicting rules and regulations. However, the term "airworthiness" as defined by the Utah Code Ann. (1943), § 4–0–19 (8) permits deviation from Federal standards in the discretion of the State authority. Only one state requires its own airworthiness certificate regardless of the Federal requirement.

fers—an established term at the time the 1938 Act was passed—could only have meant a certificate issued by the Federal authorities, and it has consistently been so construed since that time by the officers charged with enforcement of the Act (see First Annual Report of Civil Aeronautics Authority (Nov. 15, 1939), p. 33; see also regulations cited pp. 17, 18, *infra*). Petitioner's airworthiness certificate issued by the Utah State Aeronautics Commission was therefore properly held ineffective to excuse violation of Section 610 (a) (1).[6]

CONCLUSION

The decision below is correct. There exists no conflict of decisions. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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APRIL 1943.

[6] This case does not raise any question, and none was raised below, as to the validity of the certificate issued by the State Commission. In this aspect of the case, there is involved only the question of whether such a certificate can dispense with the necessity for an airworthiness certificate issued under Federal authority.